IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2006

WILLIAM D. TERRY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2003-A-20, 2004-B-946 Steve R. Dozier, Judge

No. M2005-01867-CCA-R3-PC - Filed September 27, 2006

The petitioner, William D. Terry, pled guilty to possession of one-half gram or more of cocaine with the intent to sell, a Class B felony. He received a ten-year sentence of incarceration, to be served at thirty percent. The petitioner appeals the Davidson County Criminal Court's dismissal of his petition for post-conviction relief and contends that he received the ineffective assistance of counsel. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J.S. DANIEL, SR. J., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, William D. Terry.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Amy Hunter Eisenbeck and Pamela Sue Anderson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

First, we note that the petitioner pled guilty and was convicted of possession of one-half gram or more of cocaine with the intent to sell or deliver in two separate cases, case numbers 2003-A-20 and 2004-B-946. He was represented by different attorneys in those cases. The petitioner filed petitions for post-conviction relief, challenging both convictions and arguing that he received ineffective assistance of counsel from both attorneys. The trial court heard and ruled on the petitions together, and the petitioner appealed the order denying both petitions. On appeal, however, the petitioner only argues that the performance of his attorney in case number 2003-A-20 was deficient. Therefore, our opinion will discuss only that case.

A Davidson County grand jury produced indictments against the petitioner on four charges: sale of less than one-half gram of a controlled substance containing cocaine, T.C.A. § 39-17-417;

possession with the intent to sell or deliver one-half gram or more of a substance containing cocaine, T.C.A. § 39-17-417; possession with the intent to use drug paraphernalia, T.C.A. § 39-17-425; and evading arrest, T.C.A. § 39-16-603. The state's proof underlying these charges was summarized during the plea hearing as follows:

> [O]n or about July [18, 2002], Metro police officers were working in an undercover capacity, attempting to purchase crack cocaine from street-level drug dealers, here in Davidson County.
>
> As Officer Dunn drove his vehicle southbound on North Sixth Street, he noticed the [petitioner] sitting on the porch at Ten-Nineteen, with his lights off.
>
> The officer stopped and asked for a thirty of ready. The [petitioner] ran over to the car and pulled a plastic bag out of his pocket. He tore it open and pulled three, small bags out. He placed them in Officer Beck's hand.
>
> As take-down officers announced themselves, the [petitioner] attempted to leave. He was chased and fell in the next yard.
>
> Search incident to arrest, police found two marijuana blunts on the porch and some crack cocaine in six, small bags from the yard where the [petitioner] was apprehended.
>
> Also, after asking consent from his girlfriend, Angela Bridges, who's presently indicted in another case in this court, for consent to search the house, police found two boxes of plastic bags and nine, empty plastic bags in the [petitioner's] bedroom.
>
> The substance that was sold to the police and the substance that was found on the ground in the area where the [petitioner] was recovered totaled over point-five grams. It was tested at the TBI Crime Laboratory.

Pursuant to a plea offer by the state, the petitioner pled guilty to possession of one-half gram or more of cocaine with the intent to sell and was sentenced to ten years as a Range I offender. The state dismissed the other charges. Later, the petitioner pled guilty to another charge of possession with the intent to sell and received a twelve-year sentence.

The petitioner filed a pro se petition for post-conviction relief on December 23, 2004. On April 22, 2005, court-appointed counsel filed an amended petition, alleging that the petitioner

received the ineffective assistance of counsel, which barred him from making a knowing, intelligent, and voluntary guilty plea.

At the post-conviction hearing, the petitioner's trial counsel testified that he was retained by the petitioner after the petitioner had been arrested and released on bond. He stated that while the petitioner's case was pending, the petitioner was arrested and indicted on two subsequent occasions on drug-related charges and remained in jail until his sentencing. Counsel said he and the petitioner discussed the possibility of filing a motion to suppress evidence of the drugs recovered by the police. He said that although the petitioner requested on several occasions that he file a motion, he did not think such a motion had any merit. Counsel stated that the only time he talked to any of the police officers involved in the petitioner's case was at General Sessions court on one occasion, where he spoke to one officer.

Counsel testified that the case was set for trial and that the only time he visited the petitioner in jail was the day before the trial was to begin. He said he discussed the case with the petitioner for approximately thirty minutes to one hour. He said he had seen the petitioner before this at numerous court appearances. He stated that most of his in-court conversations with the petitioner took place in the back of the court room, in a setting that was "not necessarily" private. About his conversations with the petitioner, counsel said, "Quite frankly, there was never much discussion about the case. The only thing [the petitioner] was interested in was the number of years that we could bargain this thing down to." He said the state first offered a plea deal with the petitioner receiving a sentence of twenty-seven or twenty-eight years related to his charges in all three pending cases. The petitioner was not interested in accepting such a large sentence. The morning of trial, the petitioner partially accepted the plea offer. He pled guilty to just one charge in the first case, resulting in a ten-year sentence, and left the other cases pending. Counsel said that although he had talked to only one state witness one time and although he did not believe the case would go to trial, he would not have felt incompetent trying the case. He said that sometime after the plea was entered and the petitioner was sentenced, he received a letter from the petitioner stating that the petitioner no longer wanted to be represented by him. He said he withdrew from the petitioner's pending cases. He again stated that he never filed a motion to suppress because he decided that such a motion would be without merit, based on the arresting officers' reports and his conversations with the petitioner.

On cross-examination, counsel testified that he requested and received discovery. He testified that the petitioner would have qualified as a Range II, multiple offender, which could have resulted in a sentence between twelve and twenty years on his Class B felony conviction. Instead, the petitioner received a ten-year sentence at thirty percent as a Range I, standard offender. He said that according to the warrant, the search at the petitioner's girlfriend's house was consensual and the petitioner was arrested after he sold drugs to an officer. He said he saw no issue that would have been successful on a motion to suppress.

The petitioner testified that he was in jail fifteen months by the time he pled guilty and was given his sentence. He said that during that time, his counsel visited him in jail only once, the day before the scheduled trial. He said that this meeting took about thirty minutes and that it did not help

him prepare for trial. He said it was the first time his counsel had asked him about the facts of the case and details surrounding the search of his girlfriend's home. He stated that he asked his counsel several times to file a motion to suppress but that counsel repeatedly said he would not. He said counsel did not explain why he would not file a motion to suppress except by making a general statement that there were no grounds to suppress. He said that at the time he was arrested, he was sitting on a porch with two or three other people. He said he gave the names of one of those people to his counsel, but counsel never interviewed that witness. He said the police did not find any drugs on his person but only in a field a couple of houses away from where he was sitting when the police approached him. He testified that his counsel never indicated that he had talked to police or any witnesses. He said he was represented in General Sessions court by a different attorney, so his counsel could not have talked to an officer at that time. He said that his counsel told him the day he met with him before trial that he would drive by the scene of the arrest but that counsel never told him whether he did this.

The petitioner testified that his counsel told him that they could go to trial but that counsel believed the petitioner should "cop out." He said he and his family attempted to call his counsel many times while he was in jail but could never reach counsel. He submitted into evidence a letter that he had written to his counsel after his plea and conviction, complaining that his counsel had not been in touch with him and asking his counsel to remove himself from the pending cases. The petitioner also complained about his counsel to the Board of Professional Responsibility. He said that his counsel did eventually remove himself from the pending cases.

On cross-examination the petitioner stated that he did not know whether his counsel was telling him the truth about having no grounds to file a motion to suppress. He maintained that he had nothing to do with the drugs that the police recovered. The state also questioned the petitioner about prior convictions and sentences he served in prison. He responded that he was in prison for about fourteen years but could not remember why. The court also questioned the petitioner about other attorneys of record for his case who had withdrawn from representing him. He said he remembered being represented by other attorneys but did not know why they removed themselves from the case.

The petitioner did not offer any other testimony related to the conviction currently at issue. The state offered into evidence the transcript of the plea hearing, during which the petitioner was questioned by the trial judge, stated that he understood his rights and was not being forced to plead, and pled guilty to possession of one-half gram or more of cocaine with the intent to sell. The state also offered its response to the request for discovery filed by the petitioner's counsel before the plea was entered.

In denying the petition for post-conviction relief, the trial court stated that trial counsel was effective and that the petitioner did not meet the standard of proving the ineffective assistance of counsel by clear and convincing evidence. The petitioner then filed this appeal.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The petitioner argues that his trial counsel's performance was deficient as a result of his failure to do four things: (1) to interview any state witnesses, (2) to investigate the possibility of filing a motion to suppress the drugs seized, (3) to interview or subpoena any of the witnesses the petitioner had asked him to interview or subpoena, and (4) to visit him during the several months that he was incarcerated until the day before trial and to properly prepare him for trial.

Relative to the petitioner's first and third arguments, when a petitioner contends that trial counsel's failure to investigate or interview witnesses resulted in ineffective assistance, he must be able to "produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." Black v. State, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990). If a petitioner faults trial counsel for failure to interview known witnesses, he must likewise show that the witnesses had critical evidence that was not used, which prejudiced the petitioner. Id. at 757. Thus, a petitioner's failure to present the testimony of any witnesses that he claims should have been interviewed is fatal to his challenge of ineffective assistance based on failure to interview or discover witnesses. In the present case, the trial court found that "the petitioner failed to put on any proof as to what witnesses he wanted counsel to

interview and to what the substance of their testimony would have been." The record substantiates this finding. The petitioner is not entitled to relief based on his counsel's failure to interview witnesses because he has not shown how that alleged failure prejudiced him.

As to the petitioner's remaining arguments, we fail to see how the alleged failures of counsel resulted in the petitioner's guilty plea. To be entitled to relief, the petitioner must have shown that but for his counsel's failure to file a motion to suppress or failure to meet more regularly with him to prepare him for trial, he would not have entered a guilty plea. Although the petitioner may have asked his counsel several times to file a motion to suppress, he has not shown that such a motion would have been successful. Counsel testified that there was no merit to support a motion to suppress based upon the reports of the arresting officers and what the petitioner himself said. Furthermore, the trial court found that it was a tactical decision by counsel not to file a motion. The trial court also accredited the testimony of counsel, who stated that the petitioner was primarily concerned with the length of sentence he would receive, rather than with proceeding to trial. According to counsel, the petitioner voluntarily entered the guilty plea. The trial transcript shows that the petitioner was questioned on the voluntariness of his plea and that he testified that he was not being coerced into making the plea. We conclude that the petitioner has failed to establish by clear and convincing evidence that but for his counsel's allegedly deficient performance, he would not have pled guilty. The petitioner has failed to prove that his plea was the result of the ineffective assistance of counsel.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court dismissing the petition for post-conviction relief.

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JOSEPH M. TIPTON, PRESIDING JUDGE